Commonwealth of Massachusetts
State Ethics Commission

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CONFLICT OF INTEREST OPINION
EC-COI-92-2*

FACTS:

You are counsel for a group of private-sector individuals who are supporters of State Representative Timothy O'Leary and who wish to solicit funds to provide financial assistance to him and his family. This committee does not include any state employees and is different from Representative O'Leary's political committee organized under G.L. c. 55. Representative O'Leary has authorized this committee's activities, and has consented to receive funds that it raises.

The committee proposes to accept contributions of less than $50 from any person, and contributions above that amount from anyone other than:

(a) persons with an interest in legislative business (as defined below), including legislation that has (i) come before the Ways and Means Committee[1/] in 1991, (ii) been presented to the House floor in 1991, or (iii) been filed for consideration in the 1992 legislative year;

(b) legislative agents registered on any such measures; and

(c) state employees (including state legislators).

Contributions from legislative agents who are not included in (b) will be limited to $100. To ensure that contributions meet these conditions, you have devised a disclosure form for all contributors, asking among other things whether they "have an interest (other than a general one shared by other citizens) in a bill, an appropriation, or another matter (such as a constituent service) which Mr. O'Leary considered in 1991 or may consider in 1992 or some future date." You propose to disclose to this Commission a list of donors who arguably have interests in legislative matters.

The funds are being solicited, and received by Representative O'Leary, because of his serious financial difficulties. He is currently under indictment in Middlesex County for, among other things, embezzling his legal clients' funds and using his campaign finance committee's funds for personal purposes. The proceeds of this solicitation will be used principally to aid in his legal defense and to make restitution to his legal clients. They are not intended to supplement his salary as a public employee. They will also not be used for any political purpose (i.e., for the purposes of G.L. c. 55, as interpreted by the Office of Campaign and Political Finance).

The solicitation is not occurring through a formal, mailed letter. Rather, a small group is approaching Representative O'Leary's family, friends and professional acquaintances, including lawyers who know and sympathize with him. No reference is made to his position as a State Representative. Therefore, you have reason to believe that contributions received from the solicitation are not connected with Representative O'Leary's official acts.

QUESTION:

Does G.L. c. 268A allow the proposed solicitation and receipt of funds on Representative O'Leary's behalf?

ANSWER:

Any such solicitation and receipt of funds must comply with all the following prohibitions and limitations.[2/]

DISCUSSION:

As a State Representative, Mr. O'Leary is a "state employee." G.L. c. 268A, §1(q).

Section 3(a) of G.L. c. 268A, in relevant part, prohibits anyone from directly or indirectly giving, offering, or promising anything of substantial value to a state employee "for or because of any official act performed or to be performed by such an employee," otherwise than as provided by law for the proper discharge of official duty. Section 3(b) similarly prohibits a state employee from directly or indirectly asking, soliciting, seeking, accepting, receiving, or agreeing to receive anything of substantial value "for or because of any official act or act within his official responsibility performed or to be performed by him." Anything valued at $50 or more is "of substantial value." *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8*.

This Commission has consistently read §3 broadly to effectuate the legislative purpose. As the Commission stated *In re Michael*, 1981 SEC 59, 68:

> A public employee need not be impelled to wrongdoing as a result of receiving a gift or gratuity of substantial value, in order for a violation of §3 to occur. Rather, the gift may simply be a token of gratitude for a well-done job or an attempt to foster goodwill. All that is required to bring §3 into play is a nexus between the motivation for the gift and the employee's public duties. If this connection exists, the gift is prohibited. To allow otherwise would subject public employees to a host of temptations which would undermine the impartial performance of their duties and permit multiple remuneration for doing what employees are already obliged to do - a good job.

For §3 purposes, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. *Public Enforcement Letter 92-1*, 1991 SEC 548, 558 (December 9, 1991). As the Commission explained in *Advisory No. 8*:

> [E]ven in the absence of any specifically identifiable matter that was, is or soon will be pending before the official, §3 may apply. Thus, where there is no prior social or business relationship between the giver and the recipient, and the recipient is a public official who is in a position to use [his] authority in a manner which could affect the giver, an inference can be drawn that the giver was seeking the goodwill of the official because of a perception by the giver that that public official's influence could benefit the giver. In such a case, the gratuity is given for as yet unidentifiable "acts to be performed."

In 1990, we made clear that §3 would apply even where there is evidence of a private social relationship between the donor and donee unless the private relationship is <u>the</u> motive for the gift.[3/]

Thus, in order to avoid violating §3, Representative O'Leary must avoid accepting any such contribution "for or because of any . . . act within his official responsibility." In the Commission's view, such official acts by a state legislator include constituent services. *Public Enforcement Letter 92-1*, 1991 SEC at 559-60. We have thus adopted a comprehensive test for an "interest in legislative business" that asks whether the giver has any interest (other than the general one shared with other citizens) in any past, present, or future legislative act, including a bill, an appropriation, or a constituent service; thus, motives for giving include expressing gratitude for past acts or engendering future "good will."

Therefore, Representative O'Leary must not accept any contribution of (or any contributions aggregating) $50 or more from any person or entity that discloses any such interest, or that he otherwise knows has such an interest, such as any state employee (who has an automatic interest in state appropriations). It follows that you must amend your disclosure form to include the above definition of "interest in legislative business" in substantially the words used here, and without limitation to the years 1991 and 1992.

Furthermore, §3 does not confer a "right" to accept up to $49.99 from every individual with an interest in legislative business. Unlike the campaign contribution limitations in G.L. c. 55, §§1, 7, the prohibition on solicitation or receipt by public employees of "anything of substantial value" in G.L. c. 268A, §3(b) omits any reference to donation by each "individual." Rather, §3(b) emphasizes the nexus between the gift or gifts and the "official act or act within [the] official responsibility" of the employee. Therefore, even if gifts originate from several individuals with a common interest in legislative business (as defined broadly above), or if persons with such a common

interest jointly solicit gifts, we will aggregate the total amount of such gifts based on a common interest in applying the "substantial value" test of §3(b). *See In re Flaherty*, 1990 SEC 498 (aggregating value of free sports event tickets received from two individuals with common interest). For example, such aggregation would certainly occur if partners in a law firm or officers of a corporation all contributed because of their common interest in the same legislative matter, even if (as explained above) the "matter" were simply the hope of future favorable treatment by Representative O'Leary in some constituent service. Moreover, individuals with a common interest in the same legislative subject need not work for the same business organization. For instance, we would aggregate donations from members of an association of securities dealers if they had a common interest in opposing legislation regulating their activities. Although none of the facts in your opinion request present any such question, you should seek further advice from us if such facts arise.

In addition, any legislative agent who may somehow not have an interest in any legislative business would nonetheless be limited to giving $100 in any calendar year. G.L. c. 268B, §6. Of course, virtually all legislative agents will have some interest in legislative business, and so could not give $50 or more. We read the more fact-specific $50 limit of G.L. c. 268A, §3 as controlling the more general $100 limit of G.L. c. 268B, §6.

Section 23 of G.L. c. 268A contains general standards of conduct that apply to all public employees, and imposes other limitations in this situation. Section 23(b)(2) provides that no employee may use or attempt to use his official position to secure unwarranted privileges or exemptions of substantial value for himself or others. We have interpreted this provision to prohibit use of official resources or title to further a private or personal interest. *E.g., EC-COI-90-9* (public employee could not invite to campaign meeting vendors with whom his agency contracted); *Public Enforcement Letter 89-4* (state employee could not use official stationery and state resources to promote private trip resulting in free travel for him).

Therefore, Representative O'Leary must take care that he, and any fundraising committee he authorizes or consents to receive funds from, do not use any state facilities or resources (including telephones, office supplies, copying or printing facilities, and the time of state employees), nor his title as a State Representative, to solicit these funds or to promote this fundraising effort. He must also avoid "targeting" for solicitation any person or class of persons with an interest in legislative business, as defined above. *See Compliance Letter 82-2*, 1982 SEC 80 (solicitation of municipal vendors and employees). To the extent that he knows or learns that persons have such an interest, he is prohibited from soliciting them at all, and from receiving funds "of substantial value"[4/] from them. *See EC-COI-87-7; Public Enforcement Letter 88-1*. Your disclosure form should aid in avoiding such solicitations.

Section 23(b)(3) prohibits a public employee from engaging in conduct which gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties. An elected official can avoid violating this provision, however, by publicly disclosing the facts that might otherwise lead to such an impression. Therefore, Representative O'Leary should disclose his fundraising plans in a public letter to the Clerk of the House of Representatives and to this Commission. Since §23(b)(3), unlike §§3 and 23(b)(2), does not exempt gifts of less than $50, he should also disclose in a similar public fashion a list of <u>all</u> contributors to this fundraising effort who have disclosed, or who he knows have, an interest in legislative business, with the amount each has donated and the nature of the interest.[5/] In addition, if a person who did not have an interest in legislative business at the time of the gift later acquires such an interest to Representative O'Leary's knowledge, §23(b)(3) also requires that he disclose in a similar public fashion that interest, the giver's name, and the amount of the gift.

In conclusion, because we are concerned that any solicitation of funds by a public employee raises serious problems under our statute, we emphasize the limited nature of the factual circumstances and of our advice here. These funds are being given because of Representative O'Leary's legal difficulties, principally to assist with the costs of representation and to make restitution to his former clients; they are not intended as a supplement to his salary as a public employee. As explained in detail above, any solicitation or receipt of funds on Representative O'Leary's behalf must satisfy all the following prohibitions and limitations:

1. Individuals who disclose or who are known to have any interest in legislative business may not be solicited at all. "Interest in legislative business" means any interest (other than the general one shared with other citizens) in any past, present, or future legislative act, including a bill, an appropriation, or a constituent service; thus, motives for giving include expressing gratitude for past acts or engendering future "good will."

2. A gift of $50 or more may not be accepted from anyone with such an interest in legislative business, or from any combination of persons with a common interest in the same legislative business.

3. Representative O'Leary must disclose, in public letters to the House Clerk and this Commission:

a) his solicitation plans;

b) the names of, amounts donated by, and interests of all individuals who have disclosed, or who he knows have, an interest in legislative business, as defined above; and

c) the name of, amount donated by, and interest of anyone else who acquires an interest in legislative business after making a gift.

Date Authorized: January 16, 1992

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1/] Representative O'Leary recently resigned as Vice-Chairman of the House Committee on Ways and Means.

[2/] This advice is limited to the conflict of interest law, G.L. c. 268A, and the financial disclosure law, G.L. c. 268B, the two statutes about which the Commission is authorized to give advice. *Id.* §3(g). We cannot advise you about any other requirement of law. In particular, we understand that you have also sought and received advice about the state campaign finance law, G.L. c. 55, from the responsible agency, the Office of Campaign and Political Finance. *Id.* §3.

[3/] "Where a public employee is in a position to take official action concerning matters affecting a party's interest, the party's gift of something of substantial value to the public employee and the employee's receipt thereof violates §3, even if the public employee and the party have a private personal relationship and the employee does not in fact participate in any official matter concerning the party, unless the evidence establishes that the private relationship was the motive for the gift." *In re Flaherty*, 1990 SEC 498, 500 n.6.

[4/] We again emphasize what we said about §3, which also applies to our §23(b)(2) analysis: to the extent that the individuals soliciting or giving funds share a common interest in legislative business, we will aggregate the amounts of those funds in applying the statute's "substantial value" test.

[5/] Representative O'Leary must, of course, also disclose in his annual statement of financial interests all such contributions that are "gifts" aggregating more than $100 in a calendar year, together with the name and address of the donor and the fair market value, if the donor has a direct interest in legislative business. G.L. c. 268B, §§1(g), 5(g)(5). Based on the discussion above, there should be no such donors.